

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.1130 OF 2005
WITH
CHAMBER SUMMONS NO.550 OF 2005
IN
EXECUTION APPLICATION NO.18 OF 2004
IN
HONG KONG ACTION NO.4761 OF 2001

Sumikin Bussan (Hong Kong)
International Limited

..Appellant.
(Orig.Plff./
Judgment Creditor)

Vs.

Manharlal Trikamdas Mody

..Respondent No.1
(Orig.Deft. No.2

And

ING Bank, N.V.

..Respodnent No.2
(Orig. Applicant)

Mr.R.Dada, Senior Counsel with Mr.Pratik Sekseria
with Mr.Aditya Khonna with Ms.Trishna Thapliyal
i/b.M/s.Khaitan & Co. for the Appellant.

Mr.H.Toor with Mr.Jaydeep Raut i/b.Mr.Prem Ranga for
Respondent No.1.

Mr.P.K.Samdani, Senior Counsel with Mr.B.Saraf with
Ms.Raksha Kothari with Mr.Nirav Shah with Mr.Munef
Verjee i/b M/s.D.S.K. Legal for Respondent No.2.

CORAM : DR.S.RADHAKRISHNAN &
S.J. VAZIFDAR, JJ.
DATED : 2ND MAY, 2006.

ORAL JUDGMENT : (PER S.J. VAZIFDAR, J.)

1. This is an Appeal against the order of the
learned Single Judge allowing the Chamber Summons

taken out by Respondent No.2 by directing the amendment of the terms and conditions of sale of a flat, in execution, recognising the right of Respondent No.2 therein under a leave and license agreement dated 8.10.2001.

PRELIMINARY FACTS :

2. The Appellant is a judgment creditor having obtained a decree dated 31.5.2002 against Respondent No.1 passed by the High Court of the Hong Kong Special Administrative Region, Court of First Instance, in Action No.4761 of 2001 in the sum of US \$ 618,331.26 with interest. Respondent No.1 is the judgment debtor. On 26.3.2003 the above Execution Application was taken out by the Appellant for execution of the decree of a sum of Rs.3,48,98,644.84 inter-alia against a flat owned, according to the Appellant, by Respondent No.1. According to Respondent No.1, he is the co-owner of Flat No.201, Silver Arch, Nepan Sea Road, Mumbai alongwith his wife. This is a dispute with which we are not concerned in this Appeal. A warrant of sale of the said flat was issued on 21.5.2004 and a proclamation of a sale thereof has also been issued. On 25.5.2005 the particulars and conditions of sale were finalised

by the Sheriff of Mumbai.

3. Respondent No.2, the Applicant to the above Chamber Summons, is the ING BANK, N.V., a banking company, incorporated under the Laws of Netherlands. Aggrieved by the fact that the particulars and conditions of sale finalised by the Sheriff of Mumbai do not mention their rights in respect of the said flat arising from the leave and license agreement Respondent No.2 filed the above Chamber Summons seeking to set aside the sale on the said terms and conditions. In the alternative Respondent No.2 sought an order amending the terms and conditions of sale to recognise their right to be in possession of the flat till the amount of the security deposit of Rs.3,25,00,000/- alongwith the contractual interest thereon is refunded to them as per the terms and conditions of the leave and license agreement. Respondent No.2 has also sought a declaration that they have a lien and charge over the flat and that they have a lien on possession, equivalent to a charge under the said agreement and for a right to possess, occupy and enjoy the same.

4. Respondent No.2 has based its claim upon the leave and license agreement dated 8.10.2001 entered

into between Respondent No.1 and his wife on the one hand (therein referred to as the licensors) and itself (therein referred to as the licensee) on the other. For convenience the reference to Respondent No.1 in this judgement will include a reference to his wife. Respondent No.1 granted to Respondent No.2 leave and license of the said flat and car parking spaces (therein referred to as the licensed premises) on the terms and conditions mentioned therein. As recorded in clause 25, Respondent No.2 deposited a sum of Rs.3,25,00,000/- (referred to therein and hereafter by us as the security deposit) with Respondent No.1 for due observance by Respondent No.2 of the terms of the agreement. Under clause 26 upon expiry or sooner determination of the agreement the security deposit is to be refunded without interest against Respondent No.2 handing over possession of the said flat.

5. We will refer to the relevant clauses of the agreement while dealing with the various submissions. At this stage it is necessary only to set out clauses 19 and 28 which form the fundamental basis of the second Respondent's case. Clauses 19 and 28 read as under :

"19. In the event of the Licensors desiring to sell or dispose of the Licensed Premises during the period of the licence, the Licensors shall be entitled to do so without affecting the rights of the Licensee hereunder and such sale or disposal shall be subject to the rights of the Licensee under this Agreement.

"28. In the event of failure on the part of the Licensors to refund the Security Deposit or any part thereof to the Licensee as aforesaid the Licensee shall, until the Licensors refund the entire Security Deposit, be entitled to continue to use and occupy the Licensed Premises without payment to the Licensors of any license fee or compensation and such staying over by the Licensee in the Licensed Premises shall not constitute a default by the Licensee under the Leave and License Agreement and the Licensors shall not be entitled to invoke the Bank Guarantee referred to hereinafter. Without prejudice to the aforesaid and notwithstanding anything herein contained, the Security Deposit shall thereupon from the date of expiry or termination of the licence and from the date on which the Licensee is willing to hand over vacant charge of Licensed Premises, bear and carry interest at the rate of 2% (two per cent) per month or part thereof till repayment or realization of the Security Deposit."

6. Admittedly, the security deposit has not been repaid by Respondent No.1 to Respondent No.2 despite the leave and license agreement having expired on 31.7.2003.

7. The issue that arises therefore pertains to the rights of Respondent No.2 as a result of the admitted failure on the part of Respondent No.1 in having failed to refund the security deposit and interest thereon from 31.7.2003.

SUBMISSIONS

8. Mr.Samdani, the learned Senior Counsel appearing on behalf of Respondent No.2 submitted that in view thereof Respondent No.2 is entitled to continue to remain in use and occupation of the said flat till the security deposit together with interest thereon is refunded. He further submitted that the said agreement created a mortgage in favour of Respondent No.2 over the said flat for the purpose of securing the repayment of the security deposit with interest. In the alternative, he submitted that the agreement created a charge over the said flat in favour of Respondent No.2 to secure the repayment of the said amounts. In the further alternative, he submitted that the agreement entitled Respondent No.2 to a possessory lien over the said flat till the said amounts are repaid by the licensors to Respondent No.2.

9. Mr.Dada, the learned Senior Counsel appearing on behalf of the Appellant submitted that the agreement created a bare licence in favour of Respondent No.2 which came to an end on 31.7.2003 i.e. upon the expiry of the licence period. According to him even during the period of the license Respondent No.1 would have been entitled to revoke the license despite clause 23 of the agreement by which Respondent No.2 was entitled to continue to use and occupy the licensed premises during the twenty two months license period, upon payment of the monthly compensation. He further submitted that in the event of the said flat being sold the purchaser thereof would not be bound by the licence/terms and conditions of the leave and license agreement including clauses 23 and 28 thereof in view of section 59 of the Indian Easements Act. He submitted that the rights created under clauses 23 and 28 of the leave and licence agreement are contrary to the provisions of Sections 59 and 60 of the Indian Easements Act and are accordingly unenforceable against Respondent No.1 and any transferee/purchaser of the licensed premises either. According to Mr.Dada, sections 59 and 60 of the Indian Easements Act are not subject to a contract to the contrary. According to him, the only remedy of the licensee

would be a claim for damages and nothing more. The licensee would not be entitled to enforce the terms of the agreement permitting use and occupation of the premises for any period of time irrespective of any contract to the contrary. He denied the contention that the agreement created either a mortgage or a charge or a lien in favour of Respondent No.2.

10. The case therefore falls broadly into two parts : Whether Respondent No.2 is entitled under the leave and license agreement to continue to use and occupy the licensed premises till the security deposit and interest thereon is refunded by Respondent No.1. And whether the leave and license agreement creates a mortgage or a charge or security in respect of the licensed premises to secure the repayment of the security deposit and the interest thereon.

Whether Respondent No.2 is entitled under the leave and license agreement to continue to use and occupy the licensed premises till the security deposit and interest thereon is refunded by Respondent No.1.

11. The first point, which is no longer

res-integra, requires a consideration of sections 59, 60 and 64 of the Indian Easements Act which read as under :-

"59. Grantor's transferee not bound by license.-When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license."

60. License when revocable. - A license may be revoked by the grantor, unless -

(a) it is coupled with a transfer of property and such transfer is in force ;

(b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.

"64. Licensee's rights on eviction.- Where a license has been granted for consideration and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation from the grantor."

12. Mr.Dada's submissions raise three questions under the first part viz.(i) Whether parties can by agreement make a license irrevocable or revocable only on a given condition or in given circumstances. (ii) If the answer to the first question is in the affirmative, whether a transferee of the property is

bound by such an agreement. (iii) Whether the expression "security deposit" in clause 28 of the agreement includes interest payable under the said clause.

13. The learned single Judge did not consider these aspects, quite obviously in view of a judgment of another learned single Judge of this Court in *Hongkong And Shanghai Banking Corporation Ltd. v. Diamant Borat India Private Ltd.* 1998 (1) LJ 37 = 1998 (2) Mah.L.J. 35, the ratio of which supports the Appellant's case.

14. Unfortunately neither the learned Judge who delivered the impugned judgement nor the learned Judge who delivered the judgement in *HSBC's* case had been referred to three binding judgements which to our mind concludes the matter.

. The Supreme Court in the case of *Ram Sarup Gupta (dead) v. Bishun Narain Inter College & Ors.*, (1987) 2 SCC, 555, affirmed a judgment of a learned Single Judge of this Court in *M.F. De Souza v. Childrens Education Uplift Society*, AIR 1959 Bobby, 533 and a Division Bench judgment in *Dominion of India v. Sohan Lal*, AIR 1950 East Punjab, 40. Had

these judgements been cited before either of the learned Judges we are certain that they would have considered themselves bound by them and rejected Mr.Dada's contentions based of the provisions of the Indian Easements Act.

(i) Whether parties can by agreement make a license irrevocable or revocable only on a given condition or in given circumstances.

15. In *M.F. De Souza v. Childrens Education Uplift Society*, AIR 1959 Bombay, 533, affirmed by the Supreme Court, by virtue of a compromise decree passed in a previous litigation, the Defendant occupied a room as a licensee. Under the terms of the compromise, the licence in favour of the Defendants was irrevocable. It was contended on behalf of the Plaintiff that a licence must always be regarded as revocable at the will of the licensor except in the two cases set out under section 60 of The Indian Easements Act, 1882. It was contended that section 60 did not mention any third class of cases where a licence would be irrevocable, including an agreement that it shall be irrevocable. Mudholkar, J. rejecting the contention, held as under :-

"It is no doubt true that S. 60 mentions only two classes of cases in which the licence could be regarded as irrevocable. This means that where a case falls in either of these categories the licence is made irrevocable by operation of law, that is the Easements Act. But apart from the Easements Act, there is the law of contract and if parties enter into a contract and arrive at a solemn agreement to the effect that the licence shall be irrevocable or shall be limited for a particular duration, it follows that the licensor will be bound by his engagement and will not be entitled to terminate the licence or revoke the licence at his sweet will and pleasure. If authority were necessary for this proposition, I may refer to the following passage in Corpus Juris Secundum, Vol. LIII, pp. 815-16 :

"As a general rule a mere licence, that is, one which is merely a personal privilege not coupled with an interest in the land, may be revoked by the licensor at any time, at his pleasure. This rule generally applies regardless of how long the use has been permitted, and although the intention was to confer a continuing right, and even though the licence was created by a deed or other written instrument. The general rule, however, is not without its modifications and exceptions, and does not apply where the licence is coupled with or partakes of the character of an easement and the rights under it are affirmatively and definitely fixed and settled, or where it constitutes part of a contract between the parties....."

Now, here the consent decree to which I have referred earlier was passed in an appeal which the

plaintiff had brought to this Court from the dismissal of its suit for possession of the very room a portion of which is in the defendant's occupation. The plaintiff, which had lost its suit in the first Court, agreed to allow the defendant to be in exclusive possession of one-third portion of that room, and further agreed that her right as a licensee to occupy the room will be irrevocable so long as the Bombay Rent Act remains in force. Now, it is clear that the plaintiff, which had lost earlier in the City Civil Court, wanted to rescue something out of its original claim and therefore it entered into the aforesaid compromise. The consideration for the compromise was apparently the defendant's parting with her right to the use of two-thirds of the room, because as a result of the compromise she became entitled to use only one-third of the room. The plaintiff having thus received consideration for the compromise, cannot in equity and in all fairness be allowed to go back upon it.

Therefore, I am of the opinion that, quite apart from S. 60 of the Easements Act, the Court will have to bear in mind in a suit of this nature whether the licensor is precluded from revoking the licence because of any contractual engagement into which he has entered. There being an engagement of this kind here, I am of the opinion that the plaintiff cannot claim to itself the right of revocation at its free will and pleasure. To hold otherwise and to decree possession in such circumstances would be nothing else than putting the Seal of approval of the Court to a breach of contract."
(emphasis supplied)

16(a). In *Dominion of India v. Sohan Lal*, AIR 1950 East Punjab, 40, also affirmed by the Supreme Court, the Division Bench came to the conclusion that the Railway authorities had granted in favour of the Respondent a licence to sell books and other publications, and for that purpose, to erect book stalls. The agreement was for a period of five years, renewable at the option of the Appellant for a further period of five years on the same terms and conditions and was to terminate on expiry of five years without any formal notice. For the present purpose, it is not necessary to consider certain facts regarding a separate understanding in view of the impending partition of India and the consequential possible division of the North Western Railway.

(b). In paragraphs 12 and 13, the Division Bench held as under :-

"[12]
Be that as it may, the two tests of irrevocability established by the cases and referred to above, or by the Indian Easements Act will, however, give way to the special agreement, if any, of the parties. Thus a license which is *prima facie* irrevocable either because it is coupled with a grant or interest or because the licensee has erected works of a permanent nature there is nothing to prevent the parties from

agreeing expressly or by necessary implication that the license nevertheless shall be revocable. See *Liggins v. Inge*, (1831) 7 Bing, 682 at pp. 688, 694 which was applied by the Judicial Committee in *Plimmer v. Wellington Corporation*, (1884) 9 A. C. 699 at p. 714 : (53 J.P.C. 104), *Gujarat Ginning and Manufacturing Co. Ltd., Ahmedabad v. Moti Lal Hirabhai Spinning & Manufacturing Co. Ltd., Ahmedabad*, A.I.R. (23) 1936 P.C. 77 at p. 82 : (160 I. C. 837) and *Ganga Sahai v. Badrul Islam*, A.I.R. (29) 1942 ALL. 930 : (202 I.C. 676). On the same reasoning, I should think, there will be nothing to prevent the parties from agreeing expressly or impliedly that a license, which is prima facie revocable being not within either of the two categories of irrevocable license should nonetheless be irrevocable."

"[13] As regards the remedy, even where the license is revocable the licensee is entitled to a reasonable notice before the license is revoked. If, however, the license is revoked without reasonable notice the remedy of the licensee is by way of damages and not by way of an injunction. *Aldin v. Lehimer Clark Muirhead & Co.* (1894) 2 Ch. 437 : (63 L.J. Ch. 601) and *Wilson v. Tavener*, (1901) 1 Ch. 598 : (70 L.J. Ch. 263), where an interlocutory injunction had been refused. Even if the license is obtained for consideration, yet if it is otherwise revocable and is revoked the remedy of the licensee is damages: *Smart v. Jones*, (1864) 83 L. J. C. P. 154 : (10 L.T. 271), *Kerrison v. Smith*, (1897) 2 Q.B. 445 : (66 L.J.Q.B. 762), *Prosonna Coomar Singha v. Ram Coomar Ghose*, 16 Cal. 640. The reason is obvious, for to restrain

the revocation of a revocable license is to make it (ir)revocable. If, however, the license is irrevocable and its enjoyment is obstructed by the licensor there is authority that the remedy of the licensee is either by way of injunction or in damages (see Peacock on Easement, 3rd Edn., p. 680). As already stated the Court of Equity will give relief by way of specific performance or injunction. An irrevocable license for a term implies an undertaking on the part of the licensor not to revoke it during its term and even if the license be not specifically enforceable for any reason, a threatened breach of the license may be prevented by enforcing this implied negative covenant by means of an injunction-a remedy which really gives effect to the irrevocability of the license." (emphasis supplied)

(c). As we shall shortly indicate it is this ratio that has been affirmed by the Supreme Court in *Ram Sarup Gupta (dead) v. Bishun Narain Inter College & Ors., (1987) 2 SCC, 555*.

(d). The Division Bench then, in paragraph 13, noted the argument that if the statute applies, it having prescribed a specific remedy of damages under section 64, no other remedy is available even if the case is of an irrevocable license. The Division Bench noted the judgments cited in this regard of the Calcutta High Court. Though the Division Bench

observed that the argument was not without force, it obviously did not accept the ratio of these judgments. The same is clear not merely from paragraphs 12 and 13 which we have extracted above, but also from what follows thereafter. In paragraph 15, the Division Bench held :-

"I would be prepared to say that there is "included in that contract a contract not to.
revoke the license" if the licensee performs all its obligations under the agreement and I would be inclined to hold, if that clause stood alone, that the parties by their special contract made the license, which was *prima facie* revocable under s. 60, an irrevocable license and that a threatened revocation thereof should be enforced by an injunction restraining the breach of the implied negative covenant."

(e). The Division Bench however allowed the Appeal, thereby refusing the injunction sought by the Respondent on a finding that the licence was in fact not irrevocable. In view of the facts of the case, it was observed at the commencement of paragraph 15, that clause 1 of the agreement which conferred upon the Respondent licensee, license for a period of five years was not decisive of the question as to whether it was irrevocable. It was held that clause 22 implied that the licensee would be entitled to enjoy

the license for the full term only upon performing all the obligations under the agreement. It was alleged that the licensee had committed several breaches. Clause 11 of the agreement provided that if the licensee willfully commits any breach of the undertakings contained therein or if his work proves in any way to be unsatisfactory, or if he was found unable to conduct the business as a book stall contractor, it would be lawful for the licensor to terminate the license by giving one calender months notice.

(f). What was found to be crucial by the Division Bench was that clause 11 also provided that on the question as to whether there was any such default by the licensee, the General Manager would be the sole judge. The General Manager had, in fact, decided that the Respondent had committed breaches and that the opinion of the General Manager could not be challenged in any Court. It was for these reasons that the Division Bench held that the licence was revocable and accordingly held that the licensee was not entitled to an injunction.

(g). The ultimate decision therefore of the Division Bench, did not detract from the ratio in

paragraphs 12 and 13 which clearly held that Section 60 of the Indian Easements Act is subject to a contract to the contrary viz. a license which is revocable being not within the two categories specified in Section 60 may nonetheless be made irrevocable by agreement between the parties and that a threatened revocation of such a license may be prevented by the grant of an injunction.

17. The Supreme Court in *Ram Sarup Gupta v. Bishun Narain Inter College* (1987) 2 SCC, 555, affirmed the above judgments in *M.F. De Souza v. Childrens Education Uplift Society's* case and the judgment in the case of *Dominion of India v. Sohan Lal*.

18. It would be useful to preface a consideration of *Ram Sarup Gupta's* case by referring, at the cost of repetition, to three of Mr.Dada's submissions and the essential features of the judgement qua the same.

(a). Mr.Dada submitted that Section 60 of the Indian Easements Act is not subject to a contract to the contrary. He further submitted that in any event in view of Section 59 of the Indian Easements Act

even an irrevocable license is not binding on the transferee of the property. Thirdly, Mr.Dada invited us to overrule the judgment of this Court in *M.F. De Zouaves* case and urged us not to follow the Division Bench judgement in *Dominion of India* inter-alia on the ground that the judgements were per-incuriam having failed to consider Section 64 of the Indian Easements Act. Lastly he submitted that these judgements have not considered the effect of Section 59 of the Indian Easements Act.

(b). The essential features of *Ram Sarup Gupta's* case with reference to these submissions are :-

(a) The Supreme Court upheld the judgements in *M.F. De Souza* and *Dominion of India*.

(b) The Supreme Court expressly referred to Section 64 of the Indian Easements Act.

(c) (i) The Supreme Court held that the license was irrevocable and that the license therefore could not revoke it.

and that

(ii) The Appellant being a transferee from the licensor could not and did not acquire a better right.

19. It is important to note the facts in *Ram Sarup Gupta's* case. One Raja Ram Kumar Bhargava permitted a society, of which he was the Chairman, to run a school on rent in his building.

. It is important to note with reference to Mr.Dada's contention regarding Section 59 of the Indian Easements Act, that subsequently Raja Ram Kumar Bhargava alongwith his three sons, executed a sale deed transferring the property in dispute occupied by the school to the Appellant. The Appellant served a notice on the school terminating the licence and, directing them to restore the possession of the property to him. As the Respondent failed to do so, he filed the suit for possession against the school and the society.

. In paragraph 7, the Supreme Court noted that the pleas raised by the Respondent/Defendant were that the licence was coupled with a grant, that it was a permanent and irrevocable licence and that in pursuance of the licence, the licensee had carried

out work of a permanent character, incurring expenses for the advancement of the purpose for which the licence has been granted. Thus, one of the contentions raised on behalf of the Respondent was that it was a permanent and irrevocable license. In paragraph 9 the Supreme Court held as under :-

"9. Licence as defined by Section 52 of the Act means grant of permission, by a person to the other, a right to do or continue to do, in or upon, the immovable property of the grantor, something which would, in the absence of such right, be unlawful. Such right does not amount to an easement or any interest in the property. The rights so conferred is licence. The grant of licence may be express or implied which can be inferred from the conduct of the grantor. Section 60 provides that a licence may be revoked by the grantor unless: (a) it is coupled with a transfer of property and such transfer is in force; (b) the licensee, acting upon the licence, has executed a work of permanent character and incurred expenses in the execution. Revocation of licence may be express or implied. Section 62 enumerates circumstances on the existence of which the licence is deemed to be revoked. One of such conditions contemplates that where licence is granted for a specific purpose and the purpose is attained, or abandoned, or if it becomes impracticable, the licence shall be deemed to be revoked. Sections 63 and 64 deal with licensee's right on revocation of the licence to have a reasonable time to leave the property and remove the goods which

he may have placed on the property and the licensee is further entitled to compensation if the licence was granted for consideration and the licence was terminated without any fault of his own. These provisions indicate that a licence is revocable at the will of the grantor and the revocation may be expressed or implied. Section 60 enumerates the conditions under which a licence is irrevocable. Firstly, the licence is irrevocable if it is coupled with transfer of property and such right is enforced and secondly, if the licensee acting upon the licence executes work of permanent character and incurs expenses in execution. Section 60 is not exhaustive. There may be a case where the grantor of the licence may enter into agreement with the licensee making the licence irrevocable, even though, neither of the two clauses as specified under Section 60 are fulfilled. Similarly, even if the two clauses of Section 60 are fulfilled to render the licence irrevocable yet it may not be so if the parties agree to the contrary. In Muhammad Ziaul Haqu v. Standard Vacuum Oil Co.⁴ the Calcutta High Court held that where a licence is prima facie irrevocable either because it is coupled with a grant or interest or because the licensee erected the work of permanent nature there is nothing to prevent the parties from agreeing expressly or by necessary implication that licence nevertheless shall be revocable. On the same reasoning there is nothing to prevent the parties agreeing expressly or impliedly that the licence which may not prima facie fall within either of the two categories of licence (as contemplated by Section 60) should nevertheless be irrevocable. The same view was taken by Das, J. (as he then was) in Dominion of India v.

Sohan Lal. Bombay High Court has also taken the same view in M.F. De Souza v. Childrens Education Uplift Society. The parties may agree expressly or impliedly that a licence which is prima facie revocable not falling within either of the two categories of licence as contemplated by Section 60 of the Act shall be irrevocable. Such agreement may be in writing or otherwise and its terms or conditions may be express or implied. A licence may be oral also in that case, terms, conditions and the nature of the licence, can be gathered from the purpose for which the licence is granted coupled with the conduct of the parties and the circumstances which may have led to the grant of the licence."

20. Faced with this situation, Mr.Dada and then Mr.Sekseria in the rejoinder on behalf of the Appellant submitted that the judgments in *M.F. De Souza* and *Dominion of India*, and the judgment of the Supreme Court in *Ram Sarup Gupta* did not notice the provisions of section 64 of the Indian Easements Act, 1882.

21. Mr.Dada relying upon a judgment of the Division Bench of the Gujarat High Court in *Bai Hanifa Jusab v. Memon Dadu A. Gani, Sardharia*, AIR 1964 Gujarat, 44 invited us to overrule Mudholkar J.'s judgment in *M. F. De Souza's* case. The Division Bench of the Gujarat High Court dissented

from the view taken by this Court in *M.F. De Souza's* case. It was contended before the Gujarat High Court that section 60 of The Indian Easements Act is not the only section under which a licence can be made irrevocable. It was contended that where a licence is coupled with a condition that it shall enure for a stated period, it is irrevocable during that period. The Division Bench held that even if there was such an agreement, the licence would be revocable at the will of the licensor. Referring to section 64 of The Indian Easements Act, the Division Bench held that the provisions of section 64 which entitle a licensee to recover compensation from the licensor for wrongful eviction, indicate that compensation is the only remedy of the aggrieved licensee. The Division Bench held that even if there is such an agreement and the licensor evicts the licensee before the term of the agreement has expired, the only right the licensee would have, is to recover compensation from the licensor. The Division Bench held that the provisions of section 64 established the same.

22. We are, with great respect, unable to agree with the judgment of the Gujarat High Court. The Division Bench expressly dissented from the judgment of this Court in *M.F. De Souza v. Childrens*

Education Uplift Society, AIR 1959 Bombay, 533 and the judgement in *Dominion of India v. Sohan Lal*, AIR 1950 East Punjab, 40. However, both these judgments have been affirmed by the Supreme Court in *Ram Sarup Gupta (dead) v. Bishun Narain Inter College & Ors.*, (1987) 2 SCC, 555. In the circumstances, we hold that the judgment of the Gujarat High Court has been impliedly overruled by the judgment of the Supreme Court in *Ram Sarup Gupta's* case. We are for the same reason unable to agree with the judgment of a learned single Judge in *Saheb Ram v. Banarsi*, AIR 1997 Allahabad, 222, relied upon by Mr.Dada. The judgement is contrary to the judgments in the cases of *Ram Sarup Gupta*, *M.F. De Souza* and *Dominion of India*.

23. It is incorrect that the Supreme Court did not consider Section 64 of the Indian Easements Act. Sections 62 and 64 were specifically and in terms referred to in paragraph 9 of *Ram Sarup Gupta's* case. Not that it would have carried the Appellant's case further even if it did not.

24. Further in any event, we prefer the view taken by Justice Mudholkar in *M.F. De Souza's* case. There is nothing in The Indian Easements Act and, in

particular, the chapter pertaining to licences which indicates that sections 59 and 60 cannot be subject to a contract to the contrary. The rights created are between contracting parties with no element of public policy which would debar a contract to the contrary.

25. Section 64 of The Indian Easements Act, 1882 does not expressly prohibit a contract to the contrary qua sections 59 and 60. Firstly, section 64 applies to a case where a licensee is evicted. In the present case, the licensee has not been evicted. In any event, even if a licensee is evicted, section 64 does not even impliedly bar the other remedies of a licensee, who is illegally evicted, without any fault of his own, such as, that of injunction or specific performance.

26. In fact Section 64 militates against the contentions that an agreement between parties making a license irrevocable is impermissible being contrary to the provisions of Section 60. If it were so the legislature would not have entitled a licensee even to claim damages for being prevented from fully enjoying a license granted to him for consideration. Thus the only question which can really arise is as

to the nature of relief for wrongful interference with the licensee's rights.

(ii) If the answer to the first question is in the affirmative, whether a transferee of the property is bound by such an agreement.

27. Mr.Dada then submitted that in any event, upon the right of the licensor as the owner of the property, coming to an end, the new owner will not be bound by the provisions of the licence. Mr.Dada, relied upon the judgment of a learned Single Judge of this Court in *HSBC's* case. The judgment does support Mr.Dada. Unfortunately, as we have already observed, the attention of the learned Judge was not invited to the judgments in *M.F. De Souza v. Childrens Education Uplift Society*, AIR 1959 Bombay, 533 and *Ram Sarup Gupta (dead) v. Bishun Narain Inter College & Ors.*, (1987) 2 SCC, 555. It is in these circumstances, that the judgment was delivered.

28. We were invited to overrule the judgement in *M. F. De Souza's* case and not to follow the judgement in *Dominion of India*. It was also suggested that as the judgement of the Supreme Court in *Ram Sarup Gupta's* case did not consider the

provisions of Section 59 of the Indian Easements Act, we are not bound by it on this point. We are unable to agree on both points.

29. In *HSBC's* case the material terms of the leave and license agreement were similar to those in the agreement before us. The provision for security deposit was by way of a separate agreement. This latter agreement not being registered the learned Judge held that it created no right in the Respondent. However the judgment also held :-

"9. In the present matter, I am inclined to accept the contentions advanced by Mr. Tulzapurkar. Firstly, in the present case, Leave and Licence Agreement clearly indicates that there is no right or interest in the property which is created and transferred in favour of the Applicants. The Applicants are merely given permission to occupy the property as Licensees under the Leave and Licence Agreement. The Applicants do not claim any statutory protection. The Applicants have only personal privilege which comes to an end when the right, title and interest of the Judgment Debtor stand extinguished which is not the case when the contractual obligation/right is created under the agreement for sale of land in favour of the purchaser. If a purchaser institutes a suit for specific performance a decree can be passed against the Vendor notwithstanding the Vendor selling the property to a third party for Value with notice. The reason being

that the obligation is annexed to the ownership which is not the case under the Leave and Licence Agreement. In case of Leave and Licence Agreement, only privilege is conferred upon the Applicants and when the ownership of the Licensors comes to an end the privilege under the Leave and Licence Agreement would also terminate.

.....
.....
In case of *Kashiprasad Beharilal Shukla vs. State of Madhya Pradesh* reported in 1961 MPLJ 627 = AIR 1961 MP 364, it has been held by the Madhya Pradesh High Court that the Leave and Licence Agreement comes to an end on the ceasing of the interest of the Licensor in the property particularly if the agreement merely creates bare licence. In the present case, the Leave and Licence Agreement created only a bare licence. Therefore, as and when rights of the Licensor comes to an end he ceases to be the owner when the property is put to sale pursuant to the above decree then, in that event, the Licensee cannot claim to retain possession under the Leave and Licence Agreement or under the Security Deposit Agreement. In any event, if the Applicants were claiming a lien under the Security Deposit Agreement then, as stated hereinabove, the registration under section 17(1)(b) of the Registration Act was required and in the absence of such a document being registered, the Applicants were not entitled to claim a right to retain the possession under the alleged lien."

"11. The reasoning given by this Court earlier hereinabove is also supported by the provisions of Section 52 read with section 59 of the Indian Easement Act, 1882. Under Section 52 of the Indian

Easement Act, it is provided that where one person grants to another right to do or continue to do in or upon the immovable property of the grant or something which would, in the absence of such right, be unlawful, and such right does not amount an easement or interest in the property then the right is called a licence. In this case if one goes through the Leave and Licence Agreement, it is clear that the Applicants have intended that the Agreement will be construed only as licence and that the said Agreement, will not constitute tenancy, subtenancy, easement or any right, title or interest in the property. Under Section 59 of the Indian Easement Act, it is further provided that when the grantor of the licence transfers property, the transferee shall not be bound by the licence. This is because when the Licensor conveys away the property affected by a mere license, he ceases to be bound by the licence and the assignment operates as an implied revocation of the licence (See AIR 1931, Madras, page 216)."

30. We are with great respect unable to agree with the judgement in the case of HSBC and with the submissions on behalf of the Appellant for more than one reasons.

31. Firstly, it is important to note that even in *Ram Sarup Gupta v. Bishun Narain Inter College & Ors.*, (1987) 2 SCC, 555, it was the transferee from the licensor, who had sought to evict the licensee in

whose favour an irrevocable licence had been created.

The Supreme Court in *Ram Sarup Gupta's* case, held :-

"Moreover, conduct of the parties has been such that equity will presume the existence of a condition of the license by plain implication to show that license was perpetual and irrevocable. That being so, Raja Ram Kumar Bhargava could not revoke the license or evict the school and the appellant being transferee from him could not and did not acquire any better right. The appellant, therefore, has no right to revoke the license or to evict the school, so long the school continues to carry on the purpose for which the license was granted. The trial Court and the High Court have therefore rightly dismissed the suit." (emphasis supplied)

32. These observations really conclude the matter even as regards the contention based on Section 59. It would indeed be not merely incorrect and improper but impermissible to suggest that merely because their Lordships of the Supreme Court did not specifically mention Section 59 in the course of the above discussion the effect of the observations may be ignored. The judgement in *HSBC* is therefore contrary to the judgement in *Ram Sarup Gupta's* case and therefore not good law.

33. Secondly to accept Mr.Dada's contention would

mean that though a licence is not revocable in view of section 60 of the Indian Easements Act, or in view of a contractual stipulation making a licence irrevocable or revocable only in certain circumstances, the rights of the licensee would stand extinguished merely by a transfer by the licensor of the ownership of the property. The submission is not only contrary to established law, but would leave the doors to fraud being played on licensees wide open by the simple expedient of a licensor, transferring his interest in the property to another, after accepting the entire consideration paid for the purpose of making the licence irrevocable.

34. Mr.Dada submitted that a view contrary to his would render the provision of Section 59 otiose. He submitted that the words "as such" in Section 59 indicate that a transferee is not bound by the terms of the license between the original owner as licensor and the licensee.

35. This submission too is not well founded. We are supported in this view by a series of judgements of which we shall refer to only four.

36. In *Ras Behari Lal v. Akhai Kunwar & Ors.*, AIR

1915 Allahabad, 56, the Division Bench held as under
at page 57 :

" The plaintiff admits that on the facts found the case is clearly covered by Section 60 of the Act, but he maintains that Section 59 lays down an independent rule, which entitles a transferee of property to revoke a license even if the licensee acting upon the license has executed a work of a permanent character and incurred expenses in the execution, that is to say, even if the license could not have been revoked by the original grantor. It seems to us that the words "as such" in section 59 are extremely significant and would not have appeared in the section if the intention had been to lay down an independent rule that a transferee of property might revoke a license which could not have been revoked by the transferor. The section was probably inserted in order to meet the possibility of a plea by the licensee of property that no one but the grantor of a license is entitled to revoke it, and that if the grantor does not choose to revoke it his transferee cannot do so. In our opinion Section 59 means that when the grantor of a license transfers the property, the transferee is no more bound by the license than the transferor was and, we think, it is impossible to construe this section as meaning that the transferee has a better right than the transferor. For these reasons we are of opinion that Section 59 of the Easements Act does not entitle the plaintiff to revoke the license granted to the defendant even if he is only a licensee. We need only add that the plaintiff's claim against the defendant as a trespasser is clearly not maintainable. The suit was

rightly dismissed and we dismiss this appeal with costs including fees on the higher scale."

37. The judgment was followed by a Division Bench of the Allahabad High Court in *Mathuri v. Bhol Nath & Ors.*, AIR 1934 Allahabad, 517.

38. In *L. Rajhubar Dayal v. Mt. Maharaja & Ors.*, AIR(33) 1946 Oudh, 17, it was held as under :-

"That the house in question is a roofed house and was built without any help from the zamindar was not disputed. Accordingly Lau's transferee had a right to retain possession even after Lau or his being had left the village. Apart from the reasons to which reference has been made above, it appears to me that the transfer having apparently been recognised by the previous zamindar, Bhairon's possession with regard to this house was the same as that of a riaya who constructed a house constituting a work of a permanent character under a license granted by the zamindar. The present appellant who purchased the village only in 1930 could not eject him or his heirs from the land which formed the site of the house. Reliance was placed by the learned counsel for the appellant on S. 59, Easements Act. This section, as pointed out by Katiar in the Law of Easements and Licences in British India, page 355,

"has been enacted solely in order to avoid an inference that the right of revocation is confined to the grantor personally But if the

licence is for some reasons irrevocable by the grantor himself this section does not authorise the transferee to revoke it and the provisions of this section are in this respect subject to the provisions of S.60."

39. In *Manoolal Balchand v. Kaluram Gulabchand*, AIR 1958, Madhya Pradesh, 343, the learned Single Judge held as under :

"(17). All the relevant cases have been cited by the author in foot-note 6. The reasoning in those cases has been that if the grantor of a license could not himself revoke a license, how could his transferee revoke it? In other words, the reason given is that the transferee does not get any better rights than those possessed by the transferor. It was on this footing that the late Justice Kaushalendra Rao held in *Rahim Bax v. Samsu*, 1950 Nag LJ 460: (AIR 1951 Nag 215) (Q), that a licensor cannot put an end to an irrevocable license by a transfer of property affected by the license and that a transfer does not ipso facto extinguish a license. I respectfully concur in this opinion.

(18). In my opinion, in the instant case, S. 59 (and not S.56) will be applicable, as the question of revocation of the license arises after the transfer of the absolute occupancy land to the present plaintiff : and so far as S. 59 is concerned, the view expressed above is clear that the license cannot be revoked by the transferee of the suit land."

40. We are in respectful agreement with the ratio of the above judgements and on this aspect have nothing further to add.

(iii) Whether the expression "security deposit" in clause 28 of the agreement includes interest payable under the said clause.

41. Mr.Dada then submitted that clause 28 of the agreement would permit Respondent No.2 to continue to remain in use and occupation of the premises only so long as the security deposit of Rs.3,25,00,000/- remained unpaid and not the interest thereon, which is also provided in clause 28. He based this submission on two grounds.

42. Firstly, Mr.Dada submitted that interest at 2% per annum constituted a penalty in view of the fact that as a consequence of the licensor not refunding the security deposit, Respondent No.2 was entitled, in any event, to continue to use and occupy the premises. The interest was in addition to this entitlement and, therefore, constituted a penalty.

43. We are unable to agree. The continued use

and occupation of the premises by the Respondent is involuntary and not voluntary, in the sense, that Respondent No.2 though not desirous of continuing to use and occupy the premises , does so only as a result of the breach on the part of the licensor by failing to refund the security deposit. There is therefore not necessarily any tangible or actual benefit that the licensee/Respondent No.2 derives. The fact that upon such default a provision for interest is made, in addition to permitting the licensee being entitled to the continued occupation and use of the premises, after the initial license period, as a consequence of non-refund of security deposit establishes this. This use and occupation is different from the use and occupation during the original period of the license.

44. Secondly, Mr.Dada submitted that the first sentence in clause 28 makes it clear that the licensee is entitled to continue to use and occupy the licensed premises in the event of the licensor failing to refund "the entire security deposit". In other words, he submitted, the first sentence does not include interest on the security deposit stipulated in the next sentence.

45. The submission is not well founded. It is clear to us that the expression "the entire security deposit" in the first sentence includes within its ambit, interest thereon, referred to in the next sentence of clause 28. The term security deposit is not defined in the agreement. It is important however to read clause 26 alongwith clause 28. Clause 26 provides that the security deposit during the original license period "shall not carry any interest". The second sentence in clause 28 provides that upon default in repayment of the security deposit, the security deposit shall "bare and carry" interest at the rate of 2% per month. It is important to note that the clause does not merely state that interest shall be payable on the security deposit. This is an important distinction. According to us, the expression "bare and carry" used in relation to the security deposit indicates that the security deposit would comprise of the principal sum of Rs.3,25,00,000/- together with interest thereon and not merely that interest shall be payable on the security deposit.

46. We therefore hold that Respondent No.2 is entitled to continue to use and occupy the said premises under clause 28 till the amount of

Rs.3,25,00,000/- together with interest thereon as provided therein, is repaid.

Whether the leave and license agreement creates a mortgage or a charge or security in respect of the licensed premises to secure the repayment of the security deposit and the interest thereon.

47. This brings us to the other part of Mr.Samdani's case. Mr.Samdani submitted that upon termination of the licence, clauses 24 to 28 came into operation. Clauses 24 to 28 entitle Respondent No.2 to continue to use and occupy the premises till the security deposit is repaid. This right to retain possession till repayment of security deposit and to continue to use, occupy and enjoy the premises is one of the species of the bundle of rights in the ownership of the property which the licensor has divested himself of and vested in Respondent No.2. The same constitutes an anomalous under Section 58 (g) of the Transfer of Property Act, 1882 (T.P. Act). In other words the right of ownership in any property comprises a bundle of rights one of which is the right of possession and user, transfer whereof constitutes a mortgage.

48. Mr.Samdani then submitted that if the suit agreement is construed to be an anomalous mortgage, Respondent No.2 has a right under Section 67 of the T.P. Act to bring the property to sale and to have the debt satisfied from the sale proceeds.

49. In the alternative, Mr.Samdani submitted that the document properly construed in any event creates a charge under Section 100 of the T.P. Act.

50. The learned Single Judge came to the conclusion that the said agreement constituted an anomalous mortgage under section 58(g) of the Transfer of Property Act, 1882 on and from 31.7.2003 i.e. the date on which the licence period came to an end and the licensors were bound to refund the security deposit. The learned Judge further held that assuming that the right created in the agreement was not one of mortgage, the same at least, created a right of lien in favour of Respondent No.2. The learned Judge however found that the agreement had not been duly stamped as it had not been adequately stamped. In view of the conclusion reached by the learned Judge that the agreement constituted an anomalous mortgage, he ordered the original document

to be impounded and sent to the Registrar for taking steps in accordance with law. The learned Judge accordingly allowed the Chamber Summons by directing amendment of the terms and conditions of sale so as to recognise the right of the Applicant/Respondent No.2 to remain in the possession of the flat till the repayment of the security deposit. The learned Judge however stated that he expressed no opinion with regard to the claim of Respondent No.2 in respect of interest. Finally, the learned Judge permitted the sale of the flat on the basis of the amended proclamation and terms and conditions of sale in terms of the order unaffected by the adjudication proceedings under the Stamp Act in relation to the leave and licence agreement dated 8.10.2001.

51. The submissions omit to take into consideration the most crucial aspect. It is true that the nature of the document and the true interpretation thereof will not necessarily depend upon the label given by the parties to the agreement. In order however to create a mortgage or a charge, it is essential that the parties ought to have intended that the property would constitute a security for repayment of the debt.

. In *M.C. Chacko v. State Bank of Travancore*, (1969) 2 SCC 343, the Supreme Court held at page 346 :

" For creating a charge on immovable property no particular form of words is needed: by adequate words intention may be expressed to make property or a fund belonging to a person charged for payment of a debt mentioned in the deed. But in order that a charge may be created, there must be evidence of intention disclosed by the deed that a specified property or fund belonging to a person was intended to be made liable to satisfy the debt due by him".

. In *Omrao Begum v. Secretary of State for India In Council*, 19 IA 95 the Privy Council held at page 100 : " In equity no charge can be created unless there is an intent to charge."

. That the same principle must apply to mortgages is clear from the language of Section 58(i) of the Transfer of Property Act. In *Bank of India Ltd. versus Rustom Fakirji Cowasjee*, AIR 1955 Bombay 419 paragraph 9 a learned single Judge held :-

"I have always understood that it is a firmly established rule based on sound principle that in construing a contract or deed the Court does not permit itself to be influenced by the mere form of the expression used by the parties but is always

concerned with the substance of the writing and for that purpose construes the same according to the real intention of the parties as expressed in the writing and in the light of such other facts and circumstances attending the transaction as may be relevant. The question is not of applying merely a formal test; regard is had to the substance of the transaction."

. In the case before us the document as well as the surrounding facts and circumstances militate against the creation of a charge or a mortgage.

. The first question therefore that we must address ourselves to is whether the parties intended to create a mortgage or a charge over the said flat to secure the repayment of the security deposit.

52. In our opinion there was no such intention on the part of the parties. It was never the second Respondent's case that there was any such intention. The terms of the agreement are to the contrary. The surrounding circumstances establish the contrary. There was not even an attempt on the second Respondent's part to establish such an intention till the hearing before the learned Judge.

53. There are several factors which according to

us militate against the case of there being a mortgage, charge or security as contended by Mr.Samdani.

54. The agreement is titled : "LEAVE AND LICENCE AGREEMENT". Respondent No.1 and his wife are referred to as the licensors and Respondent No.2 is referred to as a licensee throughout the agreement. Further the flat and the parking spaces throughout the agreement are referred to as the "Licensed Premises". Almost every clauses in the agreement refers to the agreement as being one of "leave and license".

. A Division Bench of this Court in *Kalabhai Bapuji Chudasama & Ors. v. The Secretary of State for India in Council*, (1905) 29 ILR, 19 (Bombay) observed at page 28 as follows :

"It is true that, generally speaking, the name given by parties to a document is not conclusive as to its nature, but the designation given by the parties themselves to it cannot be lost sight of where the document is ambiguous and is susceptible of more than one construction as to its nature and scope."

. The ratio of this judgement applies with

greater force in the present case in view of the further factors mentioned hereafter.

55. There are several clauses which expressly stipulate that the agreement is one of leave and license and that it does not create any other right, title and/or interest in favour of Respondent No.2 in the licensed premises.

"7. The Licensed Premises will be occupied only by an officer of the Licensee and the family members, bona fide guests and servants of such officer and by no other person. The Licensee shall obtain a Declaration from the officer for the time being authorised by the Licensee to occupy the Licensed Premises to the effect that he would be using the Licensed Premises only by reason of his being in the employment of the Licensee and he does not have and will not claim any right, title or interest of any nature whatsoever in the Licensed Premises and will forthwith on the expiry or sooner determination of the licence remove himself together with his family members, guests and servants and his articles and belongings from the Licensed Premises. A copy of the declaration will be furnished to the Licensors.

8. This Agreement constitutes a mere licence of the Licensed Premises and nothing contained herein constitutes or creates or shall be deemed to constitute or create any easements, tenancy,

sub-tenancy or any other similar right, title or interest in, to and upon the Licensed Premises in favour of the Licensee or as transferring any interest therein in favour of the Licensee other than the permissive right of use hereby granted. Nothing contained in this Agreement shall constitute a demise or letting of the Licensed Premises."

56. Mr.Samdani submitted that clauses 7 and 8 which bar the licensor/Respondent No.2 from having any right, title and/or interest excludes in favour of Respondent No.2 only rights other than those created by the agreement. In other words, according to him clauses 7 and 8 do not operate to exclude the rights created by the other clauses of the agreement, such as the charge and mortgage allegedly created under clauses 19 and 28. We do not agree. Clauses 7 and 8 do not contain any such restriction. They are omnibus clauses which apply to the entire agreement.

57. Mr.Samdani stated that the words "..... or any other similar right, title or interest " in clause 8 must be read ejusdem generis with the preceding terms viz. "easements, tenancy, sub-tenancy. Even assuming that to be so, the very same sentence further provides "..... or as transferring any interest

therein in favour of the licensee other than the permissible right of use hereby granted". These words are of the broadest amplitude and made it clear beyond doubt that the agreement only creates a leave and license in favour of Respondent No.2 and nothing more.

58. If the intention of the parties was as contended by Mr.Samdani, the language of clauses 7 and 8 and 19 and 28 would have been entirely different. Firstly according to us if such was the intention, the agreement would have specifically spelt out an agreement to create a mortgage or charge.

59. The doubt, if any, is further set at rest by clause 10 which reads as under :-

"10. The Licensee agrees that this Agreement is an agreement of leave and licence in respect of the Licensed Premises as contemplated by Section 24 of the Maharashtra Rent Control Act, 1999 and the provisions of the said Section 24 shall apply to the licence created under this Agreement."

. Clause 10 is not restricted to any particular clause or part of the agreement. It pertains to the entire agreement. Section 24 of the Maharashtra Rent

Control Act, 1999 deals exclusively with licenses and licensees and nothing else. Section 24 reads as under :-

"S.24. Landlord entitled to recover possession of premises given on licence on expire. -

(1) Notwithstanding anything contained in this Act, a licensee in possession or occupation of premises given to him on licence for residence shall deliver possession of such premises to the landlord on expiry of the period of licence; and on the failure of the licensee to so deliver the possession of the licensed premises, a landlord shall be entitled to recover possession of such premises from a licensee, on the expiry of the period of licence by making an application to the Competent Authority, and, the Competent Authority, on being satisfied that the period of licence has expired, shall pass an order for eviction of a licensee.

(2) Any licensee who does not deliver possession of the premises to the landlord on expiry of the period of licence and continues to be in possession of the licensed premises till he is dispossessed by the Competent Authority shall be liable to pay damages at double the rate of the licence fee or charge of the premises fixed under the agreement of licence.

(3) The Competent Authority shall not entertain any claim of whatever nature from any other person who is not a licensee according to the agreement of licence."

60. The last three recitals to the agreement further clarify that the matter. They state that the request of Respondent No.2 was only for grant of a leave and licence in respect of the licensed premises. They indicate that it is this request that the licensor acceded to. They indicate that even the permission obtained from the society was for the creation of a leave and license agreement. These facts indicate that between the parties at least there was no intention to constitute the flat as security for repayment of the dues of Respondent No.2.

61. That the parties entered into the agreement only to create a license is further clear from clause 33 which reads as under :

"33. This Agreement shall be executed in three counterparts, one counterpart to be lodged for registration by the Licensors in terms of Section 55 of the Maharashtra Rent Control Act, 1999. The Licensors and the Licensee shall each retain one of the other two counterparts. All stamp duty and registration charges payable on or in connection with this Agreement, shall be borne and paid entirely by the Licensee alone."

. Section 55(1) of the Maharashtra Rent Control

Act, 1999 pertains exclusively to agreements for leave and license or letting of any premises entered into between the landlord and the tenant or licensee. The entire agreement was made and considered by the parties to be one under the provisions of the Maharashtra Rent Control Act, 1999. The parties registered the agreement under and in accordance with the provisions of Section 55 of the Maharashtra Rent Control Act, 1999. The stamp duty was also paid on the basis of the agreement being a leave and license agreement. It is not the case of Respondent No.2 that the document was executed in the present form and that Respondent No.2 thereafter proceeded to take steps in respect thereof such as in respect of registration and computing and paying the stamp duty under a mistaken belief.

62. There is thus nothing in the leave and license agreement which even remotely supports the case of a mortgage or charge. Indeed the agreement almost conclusively establishes the contrary. Are there any other circumstances which establish the case of Respondent No.2 in this regard ? We think not. In fact the surrounding circumstances also suggest the contrary. As we shall further demonstrate this was not even the case of Respondent

No.2 at any stage and even in the affidavit in support of the above Chamber Summons.

63. Not once during all these years did Respondent No.2 ever contend either orally or in writing that the parties had intended to create a mortgage, charge or any other security. There is no explanation for this either.

64. There is not a whisper in the affidavit filed on behalf of Respondent No.2 that there was in fact an intention between the parties to the agreement to create a mortgage or charge or any other form of security in respect of the said flat for repayment of the dues of Respondent No.2. It is important to note that even the reliefs claimed in the above Chamber Summons filed by Respondent No.2, do not refer to a mortgage. Prayer (c) of the chamber summons which we intend granting merely seeks an amendment of the terms and conditions of sale recognizing the right of respondent No.2 to be in possession of the flat till the security deposit is repaid 'as per the terms and conditions of the licensed agreement'.

65. In prayer (e), respondent No.2 has claimed a declaration that it has a lien on possession

equivalent to a charge. In the affidavit in support there is nothing to suggest that a charge of the nature under Section 100 of the Transfer of Property Act was intended to be created. It is clear, therefore, that the term 'charge' is used only loosely in prayer (e). This is further clear from the fact that in prayer (e), respondent No.2 has reiterated its right to possess, occupy, use and enjoy the flat.

66. That the contention regarding a mortgage or a charge is an after-thought is clear from another aspect of the second Respondent's application/Chamber Summons. It must be noticed that nowhere in the Chamber Summons or in the affidavit in support thereof has Respondent No.2 contended that it has a charge or any other right to the sale proceeds of the licensed premises. The only application was to recognize their right to continue to use and occupy the said premises. If it was the second Respondent's case that it was a mortgagee or had a charge over the premises, it would have sought reliefs also to prevent the Appellant/decreed holder from withdrawing the proceeds realized upon the sale of the licensed premises in execution of the decree.

67. Mr.Samdani submitted that clause 23 of the agreement indicated the existence of the mortgage. Clause 23 reads as under :-

"23. Notwithstanding anything herein contained, on the Licensee regularly paying the licence fee or compensation hereunder and observing and fulfilling the terms and conditions of this Agreement, the Licensee shall be entitled to the use and occupation of the Licensed Premises without any let or hindrance from the Licensors."

. The mere fact that clause 23 entitles the licensee to occupy the premises without let or hindrance upon the licensee regularly paying the license fee would not detract from the fact that the agreement is one of leave and license only. Indeed as we have held above the licensee is entitled to continue to use the licensed premises during the subsistence of the license period. That the licensee is entitled to do so without let or hindrance would not convert the license into a mortgage or a charge or any other form of a security over the licensed premises.

68. Intention is a matter of fact. In a case such as this where the document does not contain even a whisper to this effect it was all the more

incumbent upon Respondent No.2 to have adduced evidence to establish its case regarding the creation of a mortgage, charge or any other security. There was not even an application before the learned single Judge to lead oral evidence.

69. We may conclude this discussion by referring to the following observations of a Full Bench comprising of four Hon'ble Judges of this Court in *Tukaram Mairal v. Ramchand Malukchand*, (1902) 26, ILR, Bombay :

"The learned District Judge has observed that it is not the name given to a contract, but its contents or the relations constituted by it, that determine its nature, and, applying that canon of interpretation to the present case, we are of opinion that it is impossible to come to any other conclusion than that the transaction, according to the terms thereof, was intended by the parties to be a mortgage. They have declared this in the most forcible way of which they were capable, and, in arriving at our conclusion, we think it is impossible to overlook the importance of the view taken by the parties themselves of the nature of the transaction. It is difficult to believe, when the parties deliberately designated the transaction as a mortgage, they did not believe themselves to be clothed with all the rights and remedies incidental thereto. When the terms are as clear as they are in this case, it seems a wanton exercise of

ingenuity to wrest the terms of a contract from its true construction to one to which the parties never intended it to apply. It is unnecessary, we think, to discuss the cases the decisions in which, it is contended, are adverse to the view we have expressed. They differ in circumstances more or less material from those of the one under consideration, and the natural inference is that there were special circumstances which formed the basis of the judgment in each case." (emphasis supplied)

. The ratio is clearly applicable in the facts of this case. We would only add that they apply with greater force in this case where the agreement has obviously been drafted with very competent legal assistance.

70. It appears quite clear that the entire case of mortgage and charge was legal ingenuity at the hearing of the matter and not a matter of contractual commitment.

71. Mr.Samdani submitted that the agreement in any event created a lien and as such a security for repayment of the security deposit. We are unable to agree. For the reasons already mentioned there is nothing to indicate that the licensed premises constituted security for repayment of the security

deposit in any manner whatsoever.

72. Mr.Samdani's reliance upon a judgment of the Supreme Court in *Triveni Shankar Saxena v. State of U.P. and others*, AIR 1992 SC 496 is not well founded. The Supreme Court was dealing with a service matter. The Appellant claimed a lien on his original post. In paragraphs 16 and 17, the Supreme Court dealt with the concept of a lien. The Supreme Court referring to Halsbury's Laws of England, (4th Edition, Volume 28) observed that a lien is a right to retain the possession of a property belonging to another until the claims are satisfied. The Supreme Court also referred to the Stroud's Judicial Dictionary which says that :-

"Lien. (1) A lien - (without effecting a transference of the property in a thing). - is the right to retain possession of a thing until a claim be satisfied ; and it is either particular or general. So, as regards Scotland, "lien" is defined as including "the right of retention" (Factors (Scotland) Act, 1890 (c.40), S.1); See hereon *Great Eastern Railway v. Lords Trustees* (1909) AC 109."

. Thus a mere lien permits a party to retain possession until the claim is satisfied. But without anything more that by itself does not create a

security over that property for repayment of a debt by sale or otherwise thereof. In fact during the course of the arguments before us, Mr.Samdani never contended to the contrary but we find a statement to that effect in paragraph 2 of the " Updated Brief Note on Submissions" submitted by him. Mr.Samdani however later clarified before us that this was not the intention of the note and it was in fact not his contention that a lien permitted the Appellant to bring the property to sale to satisfy its claim.

73. Mr.Samdani relied upon a Full Bench judgment of the Allahabad High Court in the case of - *Indar Sen v.Naubat Singh*, *ILR (1885) 7, Allahabad 553*, where it was held that a person who is in full ownership of a property can alienate any one or more of the component elements of ownership and that such alienation of these rights would be a mortgage. It was held that one or more of the subordinate elements of ownership including the right of possession or user may be granted out while the residuary right of ownership remains unimpaired. It was thus held that the individual elements of the bundle of rights which constitute full ownership may be disposed of without the entire right itself. In other words, a party is at liberty to grant one or more of these components

which constitutes a right of ownership to another retaining to himself the remainder.

(b). We proceed on the basis that this is so. It is however, pertinent to note that the Full Court held that the disposal of any one or more of the component elements of ownership would be a mortgage "so long as the object of the alienation was security for the payment of a debt in money." (emphasis supplied) Thus the judgment itself recognized what is obvious viz. in order to constitute a mortgage it is necessary that the object of the alienation of the right was to constitute the property security for payment of a debt.

74.(a) To the same effect is the judgment of a Division Bench of the Patna High Court in the case of *Thakur Prasad v. Raghubir Prasad*, AIR 1952 Patna 469. The Division Bench held that "the ownership of a property connotes a bundle of right in respect of that property and in a transaction of mortgage, the owner of that bundle of rights transfers some of those rights to the mortgagee and the remainder of that bundle of rights remains with him and can be transferred.

(b). It must be noted that the judgment proceeds on the basis that there was a mortgage. The judgment does not hold that an intention to create the mortgage is unnecessary. The judgement is therefore of no assistance to Mr.Samdani.

75. It is not necessary for us to deal with the judgments which Mr.Samdani cited only to illustrate the various instances which constitute the existence of an anomalous mortgage.(*Madhao Rao v. Gulam Mohiuddin, AIR 1990 Privy Council, 121 ; Kanna Kurup v. Sankara Varma Rajah (1920) 54 ILR 344 and Hathika v. Puthiyapurayil Padmanabhan, AIR 1994 Kerala 141.*) We proceed on the basis that if in the present case it can be gathered that the licensors/owners of the flat intended to create a security over the said flat for repayment of the security deposit it must be held that the agreement created an anomalous mortgage.

76(a). Mr.Samdani relied upon a Full Bench judgment of the Rajasthan High Court in *Ramdayal v. Bhawarlal, AIR 1973, Rajasthan 173*, in support of the contention that the rights given under Section 67 of the T.P. Act may be curtailed by an agreement between the parties but these rights will have effect in absence of a contract to the contrary. In other

words according to Mr.Samdani merely because the agreement does not specifically entitle Respondent No.2 to sell the said flat it would not bar Respondent No.2 from obtaining a decree for the sale of the same and to appropriate the sale proceeds towards the payment of its dues.

(b). It is important to note however that the Full Bench first came to the conclusion that an anomalous mortgage had been created to secure the repayment of both the principal and interest. It was only after having come to the conclusion that the documents created an anomalous mortgage that the Full Bench held that the mortgagee is not disentitled from exercising the right under Section 67 of the T.P. Act by bringing the property to sale merely because the document did not contain a specific clause entitling the mortgagee to do so. Here again we proceed on the basis that Mr.Samdani's submission in this regard is well founded. However, the judgment would be of no assistance to Mr.Samdani unless he first established that the leave and license agreement created an anomalous mortgage.

77. Mr.Samdani relied upon the judgment of the Supreme Court in *R.H. Shah v. H.J. Joshi*, AIR 1975

SC 1470. The judgment does not carry the case of Respondent No.2 any further. The Supreme Court held that the right to occupy a flat in a society is a species of property and was therefore attachable and saleable in execution of a decree against the judgment debtor. We are not concerned with the same in the present proceedings initiated by Respondent No.2. Mr.Toor, the learned counsel appearing on behalf of the judgment debtor has not disputed this proposition either. The judgment is of assistance to Respondent No.2 only to the extent that it recognizes that the right to use and occupy premises is a species of property.

78. Mr.Samdani then relied upon the judgment of the Full Bench of the Madras High Court in *Parvathi v. Makkan Ana*, AIR 1951, Madras 187. The judgment is of no assistance in the present case. The Full Bench considering the nature of a *kanom* held that it partakes of the nature of a mortgage with possession and a lease. The judgment is of assistance to Respondent No.2 only to the extent that it holds that a particular document may contain within it and create both a mortgage and a lease. We however, did not hear either Mr.Dada or Mr.Toor contend to the contrary. The Full Bench mentioned various

elements/incidents to be annexed to a *kanom* by the custom of the country and recognized by decisions of the Court. One of such elements is that the *kanomdar* is a mortgagee, the *kanom* amount and interest thereon being secured by the land and its usufruct. The existence of such incidents was held to constitute an anomalous mortgage.

. The judgement therefore is of no assistance to Respondent No.2. The leave and license agreement is not a *kanom* and must therefore be construed on its own terms.

79. To sum up, for the purpose of this judgment we proceed on the basis that the right to use, occupy and enjoy property is a species of property and that it is one of the component elements in the bundle of full ownership rights and is capable of being mortgaged as such. We further proceed on the presumption that if the alienation by the judgment debtor/owners of the flat was with the intention of creating a security in respect thereof for payment of the security deposit, the said agreement constituted, a charge and/or an anomalous mortgage. Lastly we also proceed on the basis that in that event Respondent No.2 is not precluded from exercising

rights under Section 67 of the T.P. Act merely because there is no specific term in the agreement entitling Respondent No.2 to sell the property and to appropriate the sale proceeds towards its dues i.e. the security deposit together with interest.

80. Mr.Dada's submission reiterated by Mr.Sekseria, the learned counsel appearing on behalf of the Appellants, that there is nothing to indicate that the parties to the suit intended creating a mortgaged or charge is well founded. We also find well founded their submission that there was no intention on the part of the parties to the said agreement to constitute the said flat as a security for payment of the dues of Respondent No.2 therein. Mr.Toor supported these submissions. The submission is well founded for the reasons we have stated. We will presume that each of the reasons taken by themselves would not be conclusive of the matter. The factors taken together however leave little room for doubt that the Appellant's submission is well founded.

81. In view of what we have held, it is not necessary to deal with Mr.Samdani's contention based on clause 9 of the agreement to the effect that

juridical possession of the flat remained with the owner only during the period of the license meaning thereby the original period of license and not after the license came to an end whereupon Respondent No.2 continued in use and occupy the same as a result of the licensors not having refunded the security deposit. Even if it were so on a totality circumstances it is impossible to hold that the agreement creates a mortgage or a charge.

82. In view of our finding that the leave and license agreement does not create a mortgage or charge, it is not necessary for us to concede Mr.Sekseria's submission that the same cannot constitute a mortgage or a charge as the permission of the society for the same in that regard had not been taken. He submitted that as the permission from the society to create mortgage or charge had not been taken, the same would be void in view of the provisions of Section 29(1) of the Maharashtra Co-operative Societies Act read with Bye-Laws 39 and 45 of the Model Bye-Laws. Nor is it necessary therefore for us to consider Mr.Toor's submission that the leave and license agreement is void as it has been witnessed by only one person. This contention was not even raised before the learned

single Judge. Further this being the second Respondent's Chamber Summons, it is not necessary for us to consider Mr.Toor's submission on behalf of Respondent No.1 that this Court has no jurisdiction to execute the decree on the ground that Hong Kong is not notified under Section 44A of the Code of Civil Procedure to be a reciprocating territory. Further this point was not even raised before the learned single Judge.

83. Mr.Toor supported Mr.Dada's contention that Respondent No.2 does not have the right to continue to use and occupy the said licensed premises for the reason of not refund of the security deposit in view of the provisions of the Indian Easements Act. Apart from the fact that we have already rejected this contention, it must be noted that before the learned single Judge, Respondent No.1 conceded and expressly recognized the right of Respondent No.2 to remain in possession of the premises till the said amount was paid. The same has been noted inter-alia in paragraph 7 of the impugned judgement.

84. In the circumstances, the following order is passed :-

- i). The Appeal is dismissed.
- ii). The Chamber Summons is made absolute in terms of prayer (c) which reads as under :-

"in the alternative to prayer (b) above, this Hon'ble Court be pleased to amend the terms and conditions of sale and recognize the right of the Applicants to be in possession of the Flat till the amount of the Security Deposit of Rs.3,25,00,000/- along with the accrued interest thereon is refunded to the Applicants as per the terms and conditions of the License Agreement;"
- iii). As the agreement dated 8.10.2001 is only a leave and licence agreement under Section 24 of the Maharashtra Rent Control Act, 1999 and does not create a mortgage or charge or any other interest in respect of the said premises other than that of leave and licence, the same been duly stamped and the document therefore, shall be returned to Respondent No.2.
- iv). There shall be no order as to costs.

v). To enable the parties to challenge this judgement and order we direct that the sale shall not take place for a period of ten weeks from today.

(DR.S. RADHAKRISHNAN, J.)

(S.J. VAZIFDAR, J.)